

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 4

WCC No. 2008-2181

SCOTT SHERWOOD

Petitioner

vs.

WATKINS & SHEPARD TRUCKING and GREAT WEST CASUALTY CO.

Respondents/Insurers.

ORDER DENYING RESPONDENT WATKINS & SHEPARD TRUCKING'S MOTION FOR RECONSIDERATION, RESOLVING PETITIONER'S REQUEST FOR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND GRANTING PETITIONER'S APPLICATION FOR TAXATION OF COSTS

Summary: Respondent moved for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment, arguing that the Court erred in finding that Petitioner was not at MMI and concluding that Petitioner was therefore entitled to TTD benefits. Petitioner moved for amendment of the Court's findings of fact and conclusions of law, arguing that he is entitled to TTD benefits retroactively from an earlier date than the Court held. Petitioner further applied for taxation of his costs.

Held: Petitioner is not at MMI. The medical evidence demonstrates that Petitioner is currently unable to perform any job duties due to his medication regimen. He is therefore entitled to TTD benefits and Respondent's motion for reconsideration is denied. Petitioner is entitled to TTD benefits retroactive to the date a physician opined he was unable to work. Petitioner's Application for Taxation of Costs is granted.

Topics:

Maximum Medical Improvement (MMI): When Reached. The Court concluded Petitioner, who developed a dependency on the pain medications prescribed to treat his industrial injury, was not at MMI where the medical evidence indicated that Petitioner would benefit from further treatment for pain management to reduce his dependency on pain medication.

Maximum Medical Improvement (MMI): When Reached. Because the medical evidence indicates that Petitioner would benefit from further treatment to regain medical stability, he is not at MMI.

Physicians: Conflicting Evidence. Where one physician saw Petitioner over a long duration of time but had not seen Petitioner in over a year, during which time Petitioner's dependency on pain medication significantly increased, the Court gave greater weight to the opinion of another physician who had seen Petitioner less frequently but more recently.

Benefits: Temporary Total Disability Benefits. Petitioner became entitled to TTD benefits on the date in which a physician opined that he was fully disabled due to his dependency on prescription pain medication. Although Petitioner argued that his TTD benefits should have started on an earlier date, no previous medical opinions took Petitioner off work due to his medication regimen.

¶ 1 Respondent Watkins & Shepard Trucking (Watkins & Shepard) moves this Court to reconsider its Findings of Fact, Conclusions of Law and Judgment issued regarding Petitioner Scott Sherwood's claim.¹ Watkins & Shepard argues that the Court erroneously concluded that Watkins & Shepard is liable for payment of temporary total disability (TTD) benefits to Sherwood because he is not at maximum medical improvement (MMI) and has not been released to his time-of-injury job.²

¶ 2 Sherwood opposes Watkins & Shepard's motion, contending that he is no longer employable and that the medical evidence presented demonstrates that he cannot work as a result of his injuries and subsequent dependency on prescription pain medications.³

¹ *Sherwood v. Watkins & Shepard Trucking and Great West Cas. Co.*, 2010 MTWCC 19.

² Respondent Watkins & Shepard Trucking's Brief in Support of Motion for Reconsideration (Opening Brief), Docket Item No. 41 at 1.

³ [Petitioner's] Response to Watkins & Shepard Trucking's Motion for Reconsideration (Response Brief), Docket Item No. 43.

¶ 3 Sherwood suffered multiple industrial injuries while working for Watkins & Shepard.⁴ Sherwood also claimed that he suffered two industrial injuries while working for a subsequent employer – Hoovestol, Inc. – in 2008.⁵ In *Sherwood v. Watkins & Shepard Trucking and Great West Cas. Co.*, I did not find Sherwood credible regarding the alleged 2008 industrial accidents.⁶ In my findings of fact, I summarized voluminous medical records and depositions of medical experts which dated from January 1994 until September 2009.⁷ I then considered Sherwood’s contention that he was “totally disabled” and entitled to benefits from either Watkins & Shepard or Hoovestol, Inc. Based on the medical evidence, I concluded that Sherwood was not at MMI and that he therefore could not be eligible for permanent total disability (PTD) benefits.⁸ Again taking the medical evidence into consideration, I concluded that Sherwood “was no longer released to return to his time-of-injury employment on September 28, 2009,” and that he was therefore entitled to TTD benefits from that date forward. I adjudged Watkins & Shepard liable for these TTD benefits since Sherwood had failed to prove that his alleged 2008 industrial accidents occurred.⁹

¶ 4 In moving for reconsideration, Watkins & Shepard argues that the Court erred in finding that Sherwood was not at MMI and in concluding that he was not released to return to his time-of-injury employment. Watkins & Shepard argues that Sherwood had reached MMI from the industrial injuries he suffered while working for Watkins & Shepard, and that he worked in an alternate position as a freight auditor at Watkins & Shepard for several years after his permanent restrictions no longer allowed him to drive a truck.¹⁰

¶ 5 Pertinent to the present motion for reconsideration, I made the following findings in the underlying case:

⁴ *Sherwood*, ¶ 5.

⁵ *Sherwood*, ¶ 6.

⁶ *Sherwood*, ¶¶ 184-85.

⁷ *Sherwood*, ¶¶ 42-183.

⁸ *Sherwood*, ¶ 189.

⁹ *Sherwood*, ¶ 194.

¹⁰ Opening Brief at 1.

¶ 5a Sherwood suffered a cerebral concussion, post-concussion headaches, and a cervical strain/sprain secondary to an industrial accident on January 31, 1997.¹¹ On May 2, 1997, Gary D. Cooney, M.D., opined that Sherwood was not yet at MMI from the January 31, 1997, industrial accident.¹² In the interim, Sherwood had experienced an industrial accident when wind caught his truck door and slammed him against his trailer.¹³ On June 2, 1997, Dr. Cooney took Sherwood off work for ten days.¹⁴ Sherwood remained off work on Dr. Cooney's orders through at least July 8, 1997.¹⁵

¶ 5b On July 16, 1997, Dr. Cooney opined that Sherwood should not drive a truck, but could work in a sedentary or light-duty position.¹⁶ Dr. Cooney released Sherwood to return to work as a truck driver with restrictions on lifting, chaining, and touching on July 28, 1997.¹⁷ Dr. Cooney took Sherwood off work again on September 2, 1997, and Sherwood apparently remained off work into December 1997.¹⁸

¶ 5c On December 4, 1997, Catherine C. Capps, M.D., conducted an independent medical examination (IME) of Sherwood. She opined that he was not at MMI and further opined that his prognosis was poor and that he was unlikely to return to work as a truck driver "now or in the future."¹⁹

¹¹ *Sherwood*, ¶ 61.

¹² *Sherwood*, ¶ 64.

¹³ *Sherwood*, ¶¶ 10, 64.

¹⁴ *Sherwood*, ¶ 65.

¹⁵ Ex. 2 at 62; *Sherwood*, ¶ 66.

¹⁶ *Sherwood*, ¶ 68.

¹⁷ *Sherwood*, ¶ 69.

¹⁸ *Sherwood*, ¶¶ 70-75.

¹⁹ *Sherwood*, ¶¶ 76-77.

¶ 5d On January 26, 1998, E. Warren Stadler, M.D., conducted an IME of Sherwood and concluded that he was at MMI for his back condition although he recommended additional treatment for Sherwood's drug dependency and other issues, including psychological counseling, physical therapy, and "medical intervention." Dr. Stadler opined that Sherwood could work in a light-duty occupation, although the likelihood of his return to driving a truck was poor.²⁰

¶ 5e On February 17, 1998, Dr. Cooney noted that Sherwood had transferred to a non-driving job at Watkins & Shepard.²¹ Dr. Cooney assigned him a 17% whole person impairment rating in April 1998.²² However, Sherwood continued to complain of back pain and headaches and continued to treat with Dr. Cooney and other medical providers up until the time of his alleged 2008 industrial accidents.²³ Pertinent to the present motion before the Court, on January 25, 2003, Mary Jozwiak, M.D., opined that Sherwood had reached MMI on November 20, 2002, and assigned him permanent restrictions on heavy or repetitive lifting. She recommended that Sherwood undergo an IME with Michael Schabacker, M.D.²⁴

¶ 5f On August 15, 2003, Sherwood attended a panel IME. The panel noted that Sherwood was currently working 50 to 60 hours per week as a freight auditor for Watkins & Shepard. The panel agreed that Sherwood should continue working in the freight auditor position.²⁵

¶ 5g In the fall of 2004, Sherwood asked his then-treating physician Dr. Schabacker to restrict him to specific work hours for the freight auditor position. Dr. Schabacker refused since he did not believe he could support Sherwood's request medically.²⁶

²⁰ *Sherwood*, ¶ 78.

²¹ *Sherwood*, ¶ 80.

²² *Sherwood*, ¶¶ 81-82.

²³ *Sherwood*, ¶¶ 83-144.

²⁴ *Sherwood*, ¶ 108.

²⁵ *Sherwood*, ¶¶ 112-13.

²⁶ *Sherwood*, ¶¶ 122-23.

¶ 5h Sherwood worked for Watkins & Shepard in the non-driving job position of freight auditor from approximately February 1998 until early 2005.²⁷ Sherwood testified that he was fired after the office manager caught him sleeping at his desk for the second time. Sherwood further testified that his refusal to attend an IME which conflicted with his work hours at his other job contributed to the decision to terminate his employment.²⁸

¶ 5i Sherwood's final appointment with Dr. Schabacker occurred on June 27, 2008. He was terminated from Dr. Schabacker's practice as of July 1, 2008.²⁹

¶ 5j Dr. Capps performed a second IME of Sherwood on December 18, 2008. She found his complaints to be "extremely similar to many, many years of documented complaints, even though he now claims they are worse."³⁰

¶ 5k On July 13, 2009, Dr. Bill Rosen examined Sherwood and opined that he would consider Sherwood fully disabled on the basis of his medication dependency.³¹

I. Is Sherwood at MMI?

¶ 6 Watkins & Shepard argues that Sherwood was found to be at MMI "on multiple occasions by multiple physicians" for each of the industrial injuries he suffered while employed at Watkins & Shepard.³² In particular, Watkins & Shepard cites to Dr. Stadler's January 26, 1998, opinion,³³ and Dr. Jozwiak's January 25, 2003, opinion.³⁴ Watkins & Shepard further argues that a job analysis for Sherwood's alternate job position as a freight auditor was approved by Dr. Stadler, and reiterates that

²⁷ *Sherwood*, ¶¶ 80, 127.

²⁸ *Sherwood*, ¶ 11.

²⁹ *Sherwood*, ¶ 152.

³⁰ *Sherwood*, ¶¶ 160-62.

³¹ *Sherwood*, ¶ 170.

³² Opening Brief at 5.

³³ See ¶ 5d, above.

³⁴ See ¶ 5e, above.

Sherwood's termination from his employment with Watkins & Shepard was for disciplinary reasons.³⁵

¶ 7 Watkins & Shepard argues that Sherwood was permanently precluded from driving a truck while he was still employed by Watkins & Shepard. Watkins & Shepard further argues that Sherwood was found to be at MMI, received an impairment rating, and successfully performed the sedentary job duties of a freight auditor – which had been approved by his treating physician – until he was terminated for cause.³⁶

¶ 8 Relying on *Hiett v. Missoula County Public Schools*,³⁷ Sherwood responds that both Dr. Capps and Dr. Rosen opined that he requires further treatment to address his prescription drug dependency, and therefore, even if he had reached MMI at some point in the past, he is not presently at MMI. Sherwood argues that the Montana Supreme Court has recognized that claimants may reach MMI, deteriorate, and require further treatment to again reach MMI. Sherwood argues that he is not at MMI since he needs additional treatment to address his prescription drug dependency.³⁸

¶ 9 Based on the medical evidence presented in this case, I remain convinced that Sherwood is not at MMI. Sherwood has developed a dependency on his pain medications which were prescribed to treat his industrial injuries and which Dr. Rosen has opined are currently at a level that preclude him from working. The medical evidence presented indicates that Sherwood would benefit from further treatment for pain management and to reduce the level of pain medication he is currently prescribed. Even if Sherwood reached MMI in the past, it is clear that he is no longer at maximum healing. As the Montana Supreme Court noted in *Hiett*, an injured worker may reach medical stability, deteriorate, and require further treatment to again reach stability.³⁹ Because Sherwood requires further treatment to regain medical stability, he is not at MMI.

³⁵ Opening Brief at 2; Exhibits A, B.

³⁶ Opening Brief at 2-3.

³⁷ 2003 MT 213, 317 Mont. 95, 75 P.3d 341.

³⁸ Response Brief at 4. See *Hiett*, ¶ 27.

³⁹ *Hiett*, ¶ 27.

II. Is Sherwood entitled to TTD benefits?

¶ 10 Under § 39-71-701(1), MCA, a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing, or until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements. Under § 39-71-701(4), MCA, if the treating physician releases a worker to return to the same, a modified, or an alternative position that the worker is able and qualified to perform with the same employer at an equivalent or higher wage than the worker received at the time of injury, the worker is no longer eligible to TTD benefits even though the worker is not at MMI. A worker requalifies for TTD benefits if the modified or alternative position is no longer available with certain exceptions, including termination for disciplinary reasons.

¶ 11 Watkins & Shepard argues that, if Sherwood is not at MMI, he nonetheless does not qualify for TTD benefits because he was released to return to an alternative position at Watkins & Shepard that he was able and qualified to perform, and that he has not requalified for TTD benefits because he was terminated from that position for disciplinary reasons. Sherwood does not dispute that he was released to return to an alternative position that he was able and qualified to perform, nor that he was terminated for disciplinary reasons; rather, he argues that the medical evidence indicates that he is no longer able to work in any job.

¶ 12 Sherwood argues that the medical evidence demonstrates that he has ongoing problems related to the industrial injuries he suffered while working for Watkins & Shepard, and that medical providers have opined that he should not be driving a truck.⁴⁰ Sherwood asserts that he has significant medical conditions from his injuries and the resulting medication use and dependency, and that his conditions have reached a point where he can no longer succeed in a competitive work environment.⁴¹

¶ 13 Sherwood argues that he cannot return to his time-of-injury job, or any other job, until his drug dependency is addressed, and therefore, he should be considered temporarily totally disabled.⁴² Sherwood notes that on July 13, 2009, Dr. Rosen noted that he could not imagine someone working while taking the amount of medications

⁴⁰ Response Brief at 2-3.

⁴¹ Response Brief at 3.

⁴² Response Brief at 4.

Sherwood was prescribed.⁴³ Dr. Rosen opined that Sherwood had been over-treated with opiates and under-evaluated. He further stated:

Based on [Sherwood's] current medication dependency, he would be considered fully disabled on this basis alone. I cannot imagine an individual working, who is currently on the medication regimen the chart work indicates [Sherwood] is taking. Even if [Sherwood's] medication regimen can be streamlined, for [Sherwood] to realistically return to the workforce would require a rather heroic effort on [Sherwood's] part, as well as very proactive care that is multidisciplinary and would include a physician with some level of pain expertise, as well as seeing a physical therapist and a psychologist all with pain treatment experience.⁴⁴

¶ 14 Watkins & Shepard acknowledges that Dr. Rosen believes Sherwood's medication use would effectively preclude him from being employable,⁴⁵ but urges the Court to rely instead on Dr. Schabacker's opinion, who noted in late 2007 that he believed Sherwood was capable of performing an occupation other than driving a truck.⁴⁶ Watkins & Shepard argues that no evidence indicates that Sherwood could not perform the freight auditor job up to the date of his alleged industrial injury at Hoovestol, Inc.⁴⁷ Watkins & Shepard states:

Dr. Rosen's opinions are suspect at best as he was not [Sherwood's] treating physician, did not review the vast majority of his medical records, and deferred to Dr. Schabacker concerning [Sherwood's] employability at the time of his alleged Hoovestol injuries. Dr. Rosen's opinion that [Sherwood] cannot work because of a head injury received during his Hoovestol employment, which the Court concluded did not occur, and increased use of medications is entirely premised on his conclusion that [Sherwood] is credible concerning his alleged Hoovestol injuries and his subjective pain complaints. In either case, Dr. Rosen is in no position to determine [Sherwood's] ability to perform sedentary work as a freight auditor, because he was not aware of it and [Sherwood] chose not to share that information with him. And, [Dr. Rosen] deferred to Dr.

⁴³ Response Brief at 1. See *Sherwood*, ¶ 170.

⁴⁴ Ex. 19 at 6. See *Sherwood*, ¶ 170.

⁴⁵ See *Sherwood*, ¶ 176.

⁴⁶ Opening Brief at 4. See *Sherwood*, ¶ 141.

⁴⁷ Opening Brief at 6.

Schabacker concerning [Sherwood's] employability at the time of [his] alleged injuries.⁴⁸

¶ 15 Watkins & Shepard further argues that Dr. Schabacker never opined that Sherwood could not work, and that Dr. Schabacker's treatment notes indicate that Dr. Schabacker encouraged Sherwood to seek a different line of work than truck driving on multiple occasions. The difficulty with Watkins & Shepard's position is that Dr. Schabacker last treated Sherwood on July 1, 2008.⁴⁹ Since that time, Sherwood's prescription drug regimen has increased significantly.

¶ 16 This Court previously found the opinion of a doctor more persuasive because of his "longer and later" treatment of a claimant.⁵⁰ In the present case, while Dr. Schabacker certainly saw Sherwood for a longer duration of time, he had not seen him in over a year at the time Dr. Rosen rendered his opinion regarding Sherwood's employability. In that year, Sherwood's condition – specifically his dependency on the pain medication prescribed for his injuries – increased significantly.

¶ 17 Although Watkins & Shepard contends that Dr. Rosen found Sherwood unable to work "because of a head injury,"⁵¹ the evidence demonstrates that Dr. Rosen opined that he would consider Sherwood unable to work purely **on the basis of his medication dependency** – not because of the disputed head injury. While I did not – and do not – find Sherwood credible regarding his alleged 2008 head injury, that does not obviate the fact that Sherwood takes prescription medications in a quantity which Dr. Rosen has opined precludes him from working. Therefore, I conclude, as I had in the underlying decision, that the weight of the medical evidence presented indicates that Sherwood is entitled to TTD benefits.

Sherwood's Request for Amendment

¶ 18 In the underlying decision in this matter, I held that Sherwood was entitled to TTD benefits starting September 28, 2009.⁵² Sherwood asks the Court to amend its decision, contending that he is entitled to TTD benefits starting June 4, 2008.⁵³ In *Sherwood*, I

⁴⁸ Opening Brief at 5.

⁴⁹ *Sherwood*, ¶ 152.

⁵⁰ *Siegler v. Liberty Ins. Corp.*, 2001 MTWCC 23, ¶ 53.

⁵¹ Opening Brief at 5.

⁵² *Sherwood*, ¶ 194.

⁵³ [Petitioner's] Request for Amemdment [sic] to Findings of Fact and Conclusions of Law (Request for Amendment), Docket Item No. 39.

noted that on September 28, 2009, Dr. Rosen testified that Sherwood's prescriptions had increased and that Dr. Rosen would no longer approve Sherwood to drive commercially.⁵⁴ Sherwood notes that on July 13, 2009, Dr. Rosen opined that Sherwood would be considered fully disabled on the basis of his medication dependency alone.⁵⁵ Sherwood further notes that Dr. Capps saw him on December 18, 2008, and opined that he should not be driving a truck.⁵⁶ Sherwood then alleges that he is entitled to TTD benefits retroactive to June 4, 2008 – his last day of employment at Hoovestol, Inc.⁵⁷

¶ 19 Watkins & Shepard opposes Sherwood's motion for amendment, arguing that Dr. Rosen's opinions are not adequate to support a conclusion that Sherwood is entitled to TTD benefits from any date because Dr. Rosen reviewed only a small portion of Sherwood's medical records and was not aware of the freight auditor position Sherwood had held at Watkins & Shepard. Watkins & Shepard alleges that no credible evidence exists to support a finding that Sherwood is unable to perform sedentary job duties. Watkins & Shepard further points out that Dr. Schabacker believed Sherwood was capable of performing employment other than driving a truck.⁵⁸

¶ 20 Sherwood remained a patient in Dr. Schabacker's practice through July 1, 2008. Dr. Schabacker kept Sherwood's requests for increased medication dosages in check so long as he remained Sherwood's treating physician. Sherwood remained capable of employment until his medication dosages increased to the point where Dr. Rosen opined that Sherwood was "fully disabled on this [medication dependency] basis alone."⁵⁹ As Sherwood points out in his brief, Dr. Rosen offered that opinion on July 13, 2009,⁶⁰ and reiterated that opinion during his September 28, 2009, deposition.⁶¹

¶ 21 In reviewing my findings in *Sherwood*, I am unable to pinpoint the specific reason why I held that Sherwood's TTD benefits should run from the date of Dr. Rosen's deposition – when he reiterated his opinion that Sherwood's medication regimen rendered him incapable of working – rather than the date of Dr. Rosen's medical notes

⁵⁴ *Sherwood*, ¶ 193.

⁵⁵ Request for Amendment at 1; *Sherwood*, ¶ 170.

⁵⁶ Request for Amendment at 2.

⁵⁷ Request for Amendment at 2.

⁵⁸ Watkins & Shepard Trucking's Brief in Opposition to Request for Amendment, Docket Item No. 42.

⁵⁹ *Sherwood*, ¶ 170.

⁶⁰ Response Brief at 1.

⁶¹ *Sherwood*, ¶176.

when he first offered that opinion. I conclude that the appropriate date from which Sherwood's entitlement to TTD benefits runs is July 13, 2009. Although Sherwood pleads for an earlier start date, no medical opinions predating Dr. Rosen's July 13, 2009, opinion take Sherwood off work due to his medication regimen. While Sherwood argues that Dr. Capps' December 2008 opinion indicates he is incapable of working in any capacity, the record does not support Sherwood's contentions, nor does the record support Sherwood's belief that his entitlement to TTD benefits should run from the date of his termination from Hoovestol, Inc.

Petitioner's Application for Taxation of Costs

¶ 22 Sherwood further applies for the recovery of costs in relation to this Court's underlying decision in this matter.⁶² Watkins & Shepard has not objected to Sherwood's application. Therefore, Sherwood's application for taxation of costs is granted.

ORDER

¶ 23 Respondent Watkins & Shepard Trucking's motion for reconsideration is **DENIED**.

¶ 24 Petitioner Scott Sherwood's request for amendment to findings of fact and conclusions of law is **GRANTED IN PART**, retroactively granting him TTD benefits to a start date of July 13, 2009.

¶ 25 Petitioner Scott Sherwood's application for taxation of costs is **GRANTED**.

¶ 26 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 15th day of February, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman H. Grosfield
Leo S. Ward
Geoffrey R. Keller
Submitted: July 20, 23, and 29, 2011

⁶² Application of Taxation of Costs, Docket Item No. 38.